Supreme Court, U.S.
FILED
FEB 6 1998
CLERK

(13)

No. 97-371

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

NATIONAL ENDOWMENT FOR THE ARTS, *et al.*,
*Petitioners,*

*v.*

KAREN FINLEY, *et al.*,
*Respondents.*

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF AMICUS CURIAE OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF RESPONDENTS

*Of Counsel:*
EDWARD TABASH
8484 Wilshire Blvd.
Suite 235
Beverly Hills,
California 90211
(213) 655-7506

STEVEN K. GREEN
*(Counsel of Record)*
JULIE A. SEGAL
AMERICANS UNITED
FOR SEPARATION OF
CHURCH AND STATE
1816 Jefferson Place, N.W.
Washington, D.C. 20036
(202) 466-3234

Washington, D.C. • THIEL PRESS • (202) 328-3286

BEST AVAILABLE COPY

28 pp

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... ii

INTEREST OF AMICUS ..... 1

SUMMARY OF ARGUMENT ..... 2

ARGUMENT ..... 3

I. Selective Government Funding of Private Entities Does Not Necessarily Implicate Free Speech Interests ..... 3

II. The Constitutionality of the NEA Arts Funding Program Is Governed by *Rosenberger v. Rector*, Not *Rust v. Sullivan* ..... 11

III. The "Decency and Respect" Provision Authorizes Prohibited Viewpoint Discrimination ..... 14

IV. The "Decency and Respect" Provision is Unconstitutionally Vague ..... 19

CONCLUSION ..... 23

## TABLE OF AUTHORITIES


Cases — Page(s)

*Bethel School District v. Fraser*, 478 U.S. 675 (1986) ..... 21

*Board of Educ. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994) ..... 17

*Brusca v. Missouri State Board of Education*, 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972) ..... 5

*Buckley v. Valeo*, 424 U.S. 1 (1976) ..... 6

*Cammarano v. United States*, 358 U.S. 498 (1959) ..... 6, 14

*Cantwell v. Connecticut*, 310 U.S. 296 (1940) ..... 17

*City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988) ..... 20

*Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530 (1980) ..... 15

*Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961) ..... 19





*FCC v. League of Women Voters*, 468 U.S. 364 (1984) ..... 8, 15

*FCC v. Pacifica Foundation*, 438 U.S. 726 (1976) ..... 21

*Ginsberg v. New York*, 390 U.S. 629 (1968) ..... 21

*Grayned v. City of Rockford*, 408 U.S. 102 (1972) ..... 19

*Harris v. McRae*, 448 U.S. 297 (1980) ..... 5, 10, 11, 12

*Healy v. James*, 408 U.S. 169 (1972) ..... 13

*Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ..... 17, 18, 20, 21

*Keyishian v. Board of Regents*, 385 U.S. 589 (1967) ..... 13, 19

*Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684 (1959) ..... 17, 18, 21

*Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993) ..... 1, 9, 14

*Maher v. Roe*, 432 U.S. 464 (1977) ..... 5, 10, 11, 12, 14

*NAACP v. Button*, 371 U.S. 415 (1963) ..... 19

*Norwood v. Harrison*, 413 U.S. 455 (1973) ..... 5, 7

*Perry Educ. Assn. v. Perry Local Educators' Assn.*,
460 U.S. 37 (1983) ..... 14

*Police Department of Chicago v. Mosley*,
401 U.S. 92 (1972) ..... 9

*R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) ..... 16

*Regan v. Taxation With Representation*,
461 U.S. 540 (1983) ..... 5, 6, 7, 11, 14

*Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995) ..... *passim*

*Rust v. Sullivan*,
500 U.S. 173 (1991) ..... *passim*

*Speiser v. Randall*, 357 U.S. 513 (1958) ..... 6

*Ward v. Rock Against Racism*,
491 U.S. 781 (1989) ..... 10, 15

Constitutional and Statute Authorities

U.S. Const. amend. I ..... *passim*

The National Foundation on the Arts and the Humanities Act
20 U.S.C. § 951 *et seq.* (amended 1990) ..... 12, 15



Personal Responsibilities and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) ..... 6

136 Cong. Rec. 28654, 28658 (Oct. 11, 1990) ..... 18

136 Cong. Rec. S17990 (Oct. 24, 1990) ..... 18

## INTEREST OF AMICUS*

Americans United for Separation of Church and State (Americans United) is a national, nonprofit public interest organization dedicated to preserving the constitutional principles of separation of church and state and religious liberty. Since its founding in 1947, Americans United and/or its members have participated either as parties or *amicus* in a majority of the leading church-state cases before this Court. Many of those cases have also involved free speech issues and, in particular, questions of viewpoint neutrality. *See Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). In addition, one of Americans United's first issues concerned state censorship of the arts that favored one religious perspective over others. Americans United files this *amicus* brief in support of Respondents because the "decency and respect" provision impermissibly favors some religious perspectives over others while it invites public officials

---

*Counsel of record for the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37. Pursuant to Rule 37.6, *amicus*, Americans United for Separation of Church and State, discloses that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae*.

to rely on their own subjective judgments as to whether certain artistic depictions are disrespectful of the beliefs and values of the American people.

## SUMMARY OF ARGUMENT

The "decency and respect" provision of the National Endowment for the Arts (NEA) funding program is unconstitutionally vague and promotes viewpoint discrimination. This Court, however, can strike down the provision without expanding on its holding in *Rosenberger v. Rector* at the expense of *Rust v. Sullivan*. Under *Rust*, the government can selectively subsidize certain programs through private entities without being required to fund alternative programs and without necessarily implicating free speech interests of recipients. This authority is not limited solely to instances where the government is speaking or using private speakers to communicate a government message.

The NEA funding program, however, meets a private speech exception to the *Rust* subsidy rule. As this Court recognized there and in *Rosenberger*, where a program has a significant expressive function or is expressly dedicated to enhancing free expression among private individuals by encouraging a diversity of views, and where that program



touches upon a traditional sphere of free expression such as the arts, the government's ability to impose content and viewpoint conditions is severely curtailed.

The "decency and respect" provision violates the First Amendment by imposing viewpoint criteria for grant approval, criteria that favor one religious perspective over others. The provision is also unconstitutionally vague because it allows NEA officials to rely on their own subjective views of whether proposed art is indecent and disrespectful of religious beliefs and values. For these reasons, the decision of the court of appeals should be affirmed.

## ARGUMENT

### I. SELECTIVE GOVERNMENT FUNDING OF PRIVATE ENTITIES DOES NOT NECESSARILY IMPLICATE FREE SPEECH INTERESTS.

This case highlights a tension between two important interests: the government's authority to accomplish its legitimate goals through the selective funding of private entities and the possible free speech interests of governmental grant recipients. This controversy does not exist in a vacuum, but is part of the much larger question of the ability of the government to define and control its programs, programs which inevitably involve

private individuals in one way or another. A holding for either Petitioners or Respondents has implications, in particular, for this Court's rulings respecting governmental aid to religious institutions and the government's authority outside of the Establishment Clause to limit funding for secular purposes and to secular entities. Moreover, the court of appeals decision relies extensively on *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), a case involving governmental subsidy of private religious expression, a decision some have argued extends beyond its particular speech context to authorize, if not mandate, religious participation in nonspeech grant programs.

Before examining the application of *Rosenberger* and *Rust v. Sullivan*, 500 U.S. 173 (1991), to the instant case, the Court should first consider the broader framework of the government's regulatory authority within funding programs. As a general matter, it is undisputed that the government, when acting in a plenary or proprietorial capacity and using governmental employees, can administer programs as it sees fit without being subject to equal protection or free speech claims. The government can, "without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program in another way." *Rust*, 500 U.S.



at 193; *accord Norwood v. Harrison*, 413 U.S. 455, 462 (1973). For example, the government could decide to fund only public education, to the exclusion of private education, even though both institutions could be seen as accomplishing the public goal of an educated citizenry. *Norwood*, 413 U.S. at 462; *Brusca v. Missouri State Board of Education*, 332 F. Supp. 275, 279 (E.D. Mo. 1971), *aff'd*, 405 U.S. 1050 (1972); *accord Maher v. Roe*, 432 U.S. 464, 477 (1977). Even where a governmental funding program implicates a protected right, the government may choose to fund only that program that advances its intended goals. *Rust*, 500 U.S. at 194; *Regan v. Taxation With Representation*, 461 U.S. 540, 549 (1983). *Cf. Harris v. McRae*, 448 U.S. 297, 317 n.19 (1980) (refusal to fund a "protected activity, without more, cannot be equated with the imposition of a 'penalty' on that activity.").

This same principle holds true even where the government uses private entities to accomplish its functions and goals. *Rust*, 500 U.S. at 193-95; *Harris*, 448 U.S. at 314-15. Just as in the category involving government employees, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust*, 500 U.S. at 194. Increasingly, the government is turning to

private entities to perform important governmental functions.[1] These grant and subsidy programs often involve proprietorial functions of the government that are indistinguishable from government-run programs but for the use of private contractors and grantees to perform governmental functions.

Even where speech is involved, the government may choose to fund some entities and not others. For example, the government could fund a program for counseling teenagers against drug abuse without being required to fund groups advocating the legalization of drug use. *See Regan*, 461 U.S. at 548-49. In some instances, the private grantee may be seen as communicating the government's message, while in others, the grantee may simply be engaged in furthering "sufficiently important governmental interests." *Buckley v. Valeo*, 424 U.S. 1, 95 (1976). In either situation, "the Government has not discriminated on the basis of viewpoint" by funding certain programs; rather, "it has merely chosen to fund one activity to the exclusion of the other." *Rust*, 500 U.S. at 193. So long as the governmental subsidy is not "aimed at the suppression of dangerous ideas," *Cammarano v. United States*, 358 U.S. 498, 513 (1959) (quoting *Speiser v. Randall*, 357 U.S. 513, 519

[1] *See* Personal Responsibilities and Work Opportunities Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).



(1958), the power of government "to encourage actions deemed to be in the public interest is necessarily . . . broad[]." *Maher*, 432 U.S. at 476.[2]

"These are scarcely novel principles." *Regan*, 461 U.S. at 549. Rather, they are crucial for the effective operation of the republic. In order to accomplish those policies and goals that represent the democratic will and advance the commonweal, the government must be able to selectively encourage certain activities it believes to be in the public interest without being required to encourage alternative programs or activities. *See Rust*, 500 U.S. at 193. To hold that the government has unconstitutionally discriminated against nonrecipients merely by deciding to fund certain programs would cripple the government's ability to operate efficiently and would render many programs suspect. *Id.* at 194; *Norwood*, 413 U.S. at 462.

The use of private entities and individuals to accomplish such goals does not necessarily change this formula. Because numerous government programs use private grantees and contractors to perform government functions, the mere funding of private entities does not implicate free speech interests. Even

[2] Accordingly, the government may appropriately attach regulations to the receipt of a grant, such as requiring grantees to comply with the antidiscrimination provisions of Title VII.

when those entities are not communicating a government message, subsidization does not necessarily deprive the government of the power to make speech-based distinctions. *See Rust*, 500 U.S. at 193-94. Thus, any construction of the law that limits the government's ability to control the application of public funds through private parties solely to instances where the government is the speaker or is expressly enlisting private parties to convey official messages is not true to this Court's holdings.

A different category of subsidy exists, however, where the government uses public funds "to encourage private speech." *Rosenberger*, 515 U.S. at 833. In one sense, this category represents the converse to the issue of a government speaker or surrogate and involves private individuals expressing their own messages. Its inquiry goes beyond the question of a private versus governmental message, however, to consider whether the overriding purpose or goal of the subsidy program is to encourage diverse views and enhance creative inquiry.[3] Where a program has a significant free speech function or is expressly dedicated to speech activity, and the government has declared its intention to encourage a "diversity of views from

[3] *Cf. FCC v. League of Women Voters*, 468 U.S. 364, 381 (1984) (asking whether a restriction is "specifically directed at a form of speech").



private speakers," viewpoint neutrality is required. *Id.* at 834; *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-94 (1993).[4]

The Court's *Rosenberger* decision fits within this third category of government programs. Crucial to the Court's holding was the fact that the Student Activity Fund (SAF) was designed to encourage "a diversity of views from private speakers" and to enhance "free speech and creative inquiry." *Rosenberger*, 515 U.S. at 834, 836. The Court also emphasized the special nature of the university with its tradition of unimpeded intellectual thought and academic freedom. *Id.* at 835-36, 850. Finally, the Court noted that the messages contained in the funded speech were attributable only to private individuals and not to the government. *Id.* at 834-35. Based on these factors, the university's denial of funding for a student publication with a religious perspective constituted viewpoint discrimination.[5]

[4] A final category would involve purely private speech outside of a funding context. "It is axiomatic [in this category] that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger*, 515 U.S. at 828; *accord Police Department of Chicago v. Mosley*, 408 U.S. 92, 96 (1972).

[5] Importantly, though, this Court emphasized that, notwithstanding the purpose of the SAF, the university could exercise content

These factors distinguished the SAF from the funding programs in *Rust*, *Harris*, and *Maher* and thus produced a different result.[6] More important, *Rosenberger* is fundamentally a free speech case involving a "traditional sphere of free expression." *Rust*, 500 U.S. at 200. It has scant application to government funding programs that fit within either of the first two categories. As this Court reaffirmed in *Rosenberger*, "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes. . . . When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." 515 U.S. at 833.[7]

---

selectivity through its subsidy. *Id.* at 826 (noting that if the religious publication, Wide Awake, had been a *religious* organization, it would have fallen outside the category of organizations eligible for funding).

[6] As a further distinction from the *Rust*-type program, the Court also analogized the SAF to a public forum: "The SAF is a forum more in a metaphysical than in a spacial or geographic sense, but the same principles are applicable." *Rosenberger*, 515 U.S. at 830.

[7] On this point, the Court was unanimous. As Justice Souter stated for the dissenters, "when determining whether a speech restriction is content based or content neutral, '[t]he government's purpose is the controlling consideration.'" *Id.* at 894 (Souter, J., dissenting) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).



Thus *Rosenberger* cannot be seen as mandating the funding of other activity or rights merely because the government has chosen to accomplish its goals through the selective use of private entities. *Rust*, 500 U.S. at 193; *Regan*, 461 U.S. at 548-49. Nor should it be viewed as narrowing the earlier rule represented in the holdings of *Rust*, *Harris*, *Regan*, and *Maher*. Its holding is unique to those programs with significant free speech functions or those expressly designed to enhance a diversity of views through private expression.

## II. THE CONSTITUTIONALITY OF THE NEA ARTS FUNDING PROGRAM IS GOVERNED BY ROSENBERGER V. RECTOR, NOT RUST V. SULLIVAN.

Because the NEA funding program is similar to the program in *Rosenberger* in its most important respects, the court of appeals correctly held that any substantive speech regulations in the program are subject to strict scrutiny.

Of primary significance is the fact that free expression is not merely a by-product of the funding program but is its very function. The National Foundation on the Arts and the Humanities Act, (NFHA Act) describes its purpose as "creat[ing] and sustain[ing] not only a climate encouraging freedom of thought, imagination, and inquiry but also the

material conditions facilitating the release of this creative talent." 20 U.S.C. § 951(5). The program here, unlike the one in *Rust*, expressly expends funds "to encourage a diversity of views from private speakers." *Rosenberger*, 515 U.S. at 834. But even beyond this overriding purpose of enhancing "free speech and creative inquiry", *id.* at 836, a purpose that distinguishes the program from those in *Rust*, *Harris* and *Maher*, there is nothing to indicate that grant recipients somehow act as surrogates for government speech or are creating art for the benefit of the government.[8] Because the NFHA Act makes only the most laudatory of statements about the value of art, the government cannot be seen as conveying any official message through the subsidization program. As even the NEA acknowledges, the funding program is not a mechanism for communicating government messages. NEA Brief at 29.

Neither does the NEA funding program represent a traditional, proprietary function of the government. While the

---

[8] It is ludicrous to equate the subsidy of artists under the funding program with the government's managerial acts of purchasing art for National Gallery of Art or the Smithsonian Institution. *See* Brief of American Center for Law and Justice at 4, 13 (likening the NEA to a "purchaser of art or a prize giver," thus effectively equating the recipient's art with "government speech.").



government has an important role in arts funding, it has neither the history nor plenary involvement that exists with many other government programs using private contractors. Moreover, artistic expression falls within one of those special contexts of a "traditional sphere of free expression." *Rust*, 500 U.S. at 200. Free expression, critique and creative inquiry, all central to academic freedom and intellectual growth in a university setting, *see Healy v. James*, 408 U.S. 169, 180-81 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), are no less indispensable to the arts. Also like the university, the important role the arts perform in the society as a whole can only be accomplished when it is uncensored. Indisputably, many of the same concerns that identify the special nature of the university apply equally to the arts.

The presence of these factors in the funding program leads to the conclusion that the NFHA Act has created a subsidy program in a "traditional sphere of free expression," such that the government is prohibited from attaching viewpoint controls to its expenditures. *Rust*, 500 U.S. at 200. These factors also outweigh any inference to be drawn from the selective nature of the grant process or the limited number of recipients. While the NEA is correct that only a small number of applicants are awarded grants, that fact has more to do with the reality of scarce resources than with reflecting a goal under the NFHA

Act to control artistic freedom through regulatory funding. Accordingly, the court of appeals correctly found that the funding program fits within an exception to the *Rust* rule, similar to the one presented in *Rosenberger*. The NEA is thereby prohibited from imposing viewpoint conditions in its funding decisions.

## III. THE "DECENCY AND RESPECT" PROVISION AUTHORIZES PROHIBITED VIEWPOINT DISCRIMINATION.

Because the NEA funding program involves a traditional sphere of free expression, the government is required to be neutral in its grant-making and avoid discriminating on the basis of viewpoint. *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 393-94; *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). The "egregiousness" of viewpoint discrimination in such spheres is unquestioned. Government is forbidden from "discriminat[ing] invidiously in its subsidies in such a way as to 'ai[m] at the suppression of dangerous ideas.'" *Regan*, 461 U.S. at 548 (quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959)).

The principle inquiry for determining content neutrality is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys. . . . The



government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *accord Rosenberger*, 515 U.S. at 894 (Souter, J., dissenting). "[R]egulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech.'" *FCC v. League of Women Voters*, 468 U.S. 364, 383-84 (1984) (quoting *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 546 (1980) (Stevens, J., concurring in judgment)).

The "decency and respect" provision imposes a form of viewpoint discrimination. The 1990 amendment was enacted for the sole purpose of preventing government funding of particular perspectives on otherwise includable subjects. It prohibits the NEA from funding projects, regardless of their artistic merit, if they offend general standards of decency or are disrespectful of the beliefs and values of the American people. 20 U.S.C. § 954 (d)(1).[9] Thus art that is "respectful" of religious beliefs and values, such as a depiction of the Madonna and Child containing themes of adoration and devotion could be funded, whereas a

---

[9] The word "belief" is commonly understood to have a religious meaning. *See* Webster's New International Dictionary, 2d ed. (1957) (defining "belief" as "a persuasion of the truths of region; faith; assent to a revealed truth on the authority of God.").

different depiction of the same subject-matter with Oedipal overtones would be rejected. Or, to take an example at the heart of the debate over the 1990 amendments, a depiction of a crucifix presented in a reverent and respectful manner would be eligible for funding whereas a depiction of a crucifix submerged in a vial of urine would not. This distinction amounts to viewpoint discrimination in its most egregious form, of distinguishing between differing views or presentations of identical subject-matter.[10] *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 391-92 (1992) (holding that viewpoint discrimination exists where only negative presentations of includable subject matter are prohibited); *Kingsley International Pictures Corp. v. Regents*, 360 U.S. 684, 688 (1959) (striking a statute that denied licensing to films that portrayed "acts of sexual immorality" favorably).

The First Amendment interests implicated in the decency and respect provision are only highlighted through the statute's preferential treatment of religion. This preference for "respectful" depictions of religious values and beliefs over art that some might term disrespectful or blasphemous implicates

---

[10] "Religion may be a vast area of inquiry, but it also provides . . . a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Rosenberger*, 515 U.S. at 831.



the Establishment Clause by requiring the government to abandon its position of neutrality toward religion. *Board of Educ.. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 696 (1994).[11] In *Joseph Burstyn, Inc. v. Wilson*, the Court struck down a statute that prohibited licensing of "sacrilegious" films, noting that under such a standard, even "the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another," and that "he would be subject to the inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority." 343 U.S. 495, 505 (1952). In the same manner, NEA officials must judge proposed art for any religious offensiveness (however that is determined) and then exclude art presenting that perspective. The funding program therefore puts the government in a position of preferring religious viewpoints over irreligious viewpoints and entangles NEA officials in religious matters through the review and vetting process.

This is not mere conjecture. During the debates over the 1990 amendments, members of Congress strongly criticized Andres Serrano's "Piss Christ," referring to it as "blasphemous",

---

[11] But "[i]n the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

as "denigrating our Lord, Jesus Christ", and as "offensive to Judeo-Christian values." 136 Cong. Rec. 28654, 28658 (Oct. 11, 1990); 136 Cong. Rec. S17990 (Oct. 24, 1990).[12] "Piss Christ" was held out as the very type of art that should not be publicly funded because of its anti-religious perspective. Having received clear direction from Congress to deny funding of those art projects that are "disrespectful" of religious beliefs like "Piss Christ," the NEA will engage in a review process that not only discriminates against one perspective of includable subject-matter, but one that prefers "respectful" depictions of religious themes over those deemed disrespectful, thus implicating the Establishment Clause. *See Joseph Burstyn*, 343 U.S. at 505 (declaring that the application of the "sacrilegious test" raised "substantial questions under the First Amendment's guarantee of separate church and state with freedom of worship for all.").

---

[12] One *amicus* in support of the NEA urges that the appropriate interpretation of the decency and respect clause is whether the depiction is "blasphemous." *See* Brief of Morality in Media at 4-5. Others urge an interpretation that prohibits funding of art with "immoral" themes. *See* Brief of National Family Legal Foundation at 14. As this Court stated in *Kingsley International Pictures*, however, the constitutional guarantee of freedom of speech "is not confined to the expression of ideas that are conventional or shared by the majority." 360 U.S. at 689.



## IV. THE "DECENCY AND RESPECT" PROVISION IS UNCONSTITUTIONALLY VAGUE.

For many of the same reasons discussed in the previous section, the "decency and respect" provision is unconstitutionally vague. While constitutional concerns over vague laws have been most acute in the area of criminal law, courts have also applied heightened vagueness standards where laws "'abut[] upon sensitive areas of basic First Amendment freedoms'" and in turn operate "to inhibit the exercise of [those] freedoms." *Grayned v. City of Rockford*, 408 U.S. 102, 109 (1972) (quoting *Cramp v. Board of Public Instruction*, 368 U.S. 278, 287 (1961)). "'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms,' *NAACP v. Button*, 371 U.S. 415, 438, '[f]or standards of permissible statutory vagueness are strict in the area of free expression.'" *Keyishian*, 385 U.S. at 603-604.

One way in which vague laws violate the Constitution is that they "impermissibly delegate[]" policy determinations to public officials "for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 109. The vesting of "unbridled discretion" in government officials over whether to approve certain expressive activity, in the absence of clear

standards, invites those same officials to rely on "illegitimate criteria" for discriminating against disfavored speech. *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 757-58 (1988).

The indefiniteness of the "decency and respect" provision gives rise to such arbitrary and discriminatory application while it invites reliance on illegitimate criteria. It grants to NEA officials the power to deny funding applications if the proposals offend the officials' subjective religious beliefs and values. In particular, it invites them to rely on their own subjective views of what religious beliefs and values conform to dominant beliefs of the American people. The only guidance in this area comes from Congress, which has sent a clear message that blasphemous and disrespectful depictions of religious belief are not to be funded. Like the censors in *Joseph Burstyn*, NEA officials are thus "set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies." 343 U.S. at 504-05.

The NEA and its *amici* insist that the "decency and respect" provision is not unconstitutionally vague because this Court has previously upheld restrictions on free speech employing similar terms. *See* NEA Brief at 39-40; Brief of



American Center for Law and Justice at 22; Brief of National Family Legal Foundation at 7-14. But the authority upon which this argument relies, primarily *Bethel School District v. Fraser*, 478 U.S. 675 (1986), and *FCC v. Pacifica Foundation*, 438 U.S. 726, 740 (1976), is inapposite to a context like the NEA funding program. This Court has generally been willing to uphold the application of vague definitions of decency in cases involving impressionable children. In *Bethel*, the Court focused on the use of lewd and suggestive language in a captive audience of school children, 478 U.S. at 683-84, whereas in *Pacifica*, it was willing to uphold an "indecency" restriction primarily out of a concern that the pervasive and indiscriminate nature of the broadcasts made it likely that young children would be among the audience. *Pacifica*, 438 U.S. at 748-50. *Accord Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding ban on sale of sexually explicit, but not otherwise obscene, material to minors). But the Court has been unwilling to provide such latitude for vague statutes regulating speech outside of these contexts. *See Kingsley Inter. Pictures*, 360 U.S. 684 (rejecting the authority of state to refuse license for "immoral" or "indecent" films); *Joseph Burstyn*, 343 U.S. at 504-05 (striking ban on "sacrilegious" films). As was iterated in *Joseph Burstyn*:

> [T]he state has no legitimate interest in protecting any or all religions from views distasteful to them . . .. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.

343 U.S. at 505.

## CONCLUSION

For the foregoing reasons, *amicus* requests that the decision of the court of appeals be affirmed.

Respectfully submitted,

*Of Counsel*:
Edward Tabash
8484 Wilshire Blvd.
Suite 235
Beverly Hills, CA
90211
(213) 655-7506

Steven K. Green*
Julie A. Segal
Americans United for Separation
of Church and State
1816 Jefferson Place, N.W.
Washington, DC 20036
(202) 466-3234

* *Counsel of Record*